No. 22604

In the

United States Court of Appeals

for the Ninth Circuit

MATSON NAVIGATION COMPANY,
Petitioner,
vs.
FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Reply Brief of Petitioner
Matson Navigation Company

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SUBJECT INDEX

TABLE OF AUTHORITIES

AGENCY DECISIONS

STATUTES AND REGULATIONS

OTHER AUTHORITIES

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In addition to the brief filed herein by Petitioner Matson Navigation Company April 15, 1968 (MB), briefs have been filed, respectively, on behalf of Respondents United States of America by the Department of Justice (JB), Respondent Federal Maritime Commission (CB) and Intervening Respondents American Mail Line Ltd., American President Lines, Ltd. and Pacific Far East Line, Inc. (RB).[1]

Matson's position and its reasons for believing the Commission does not have merger jurisdiction and that its approval of the merger was erroneous, in any event, are fully stated in our earlier brief. We shall here first respond to respondents' contention

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1. The four briefs filed will at times be abbreviated as indicated in parenthesis above. We shall refer to the intervening respondents as "respondents," and the two required respondents, respectively, as "the Commission" and "Justice." Record references and other abbreviations will be in accordance with those employed in Matson's brief of April 15, 1968.

Matson lacks standing and then seek to bring the principal questions into focus in the course of commenting on the relevant arguments advanced by the Commission and respondents.

I. MATSON HAS STANDING TO LITIGATE RESPECTING ALL QUESTIONS PRESENTED BY ITS PETITION IN THIS COURT.

A. Matson is a Party Aggrieved by the Commission's Order.

Neither the Commission nor Justice has joined respondents' contention that Matson lacks standing to seek judicial review of the Commission's order. The contention is without merit. Pursuant to 28 U.S.C. § 2344, any "party aggrieved" has standing to seek judicial review of the Commission's orders under Section 15 of the Shipping Act, 1916. Matson was a party to the proceedings before the Commission[2] and Matson was "aggrieved" by the Commission's order approving the merger both (1) because Matson will be confronted with a stronger competitor as a result of the merger and (2) because Matson would be barred by the *res judicata* effect of the Commission's order, if permitted to stand, from thereafter challenging the validity of the merger in any antitrust suit it might find it necessary to bring against respondents.

1. MATSON'S STANDING AS A COMPETITOR.

Matson's petition to review outlines the nature of present and potential competition between Matson and respondents. The petition recites (p. 3) that Matson presently operates cargo vessels between the United States Pacific Coast and the Far East[3] and cargo and passenger vessels between the United States Pacific Coast and Hawaii, that respondents presently operate cargo ves-

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2. Matson was named a party in the Commission's order of investigation (R.D. 1, p. 2), as the Commission's decision of October 3, 1967 recites (R.D. 36, p. 2). This much is conceded by respondents (RB 12), though they claim the Commission later also, and contradictorily, found Matson lacked sufficient interest to be named a party (see *infra,* pp. 6-7).

3. At the time of the hearing before the Commission, Matson had not yet commenced service in the Far East trade, but it had firm plans to do so in the fall of 1967 (R.Tr. 1704-08). That service was commenced in September, 1967, and is presently in operation, as planned, with two container vessels.

sels between the United States Pacific Coast and the Far East, and that APL operates vessels that carry passengers between the United States Pacific Coast and Hawaii and plans to take up an interest in a corporation that will operate cargo vessels in the California-Hawaii trade.[4] The Commission's decision finds that as a result of merger respondents "would become in many ways a more formidable competitor" (R.D. 43, p. 15). This strengthened competition will be a reality if the Commission's approval stands unchallenged, and it provides Matson with a sufficient interest to maintain this appeal.

The leading case is *Federal Communications Comm'n v. Sanders Bros. Radio Station,* 309 U.S. 470, 475-77 (1940). The Court there held that increased competition afforded petitioner radio station standing to seek judicial review of the Commission's order granting a radio license to another station. This was so, even though the Commission was not required to give independent consideration to the economic detriment to competitors resulting from grant of a license. The Court did not concern itself with the nature or extent of financial detriment to petitioner. The mere fact that the grant of a license would increase competition gave the petitioner the requisite interest and standing as a party "aggrieved" or "adversely affected" within the meaning of the applicable statute.[5]

The rule of the *Sanders* case has been repeatedly applied by the lower federal courts in according persons standing to litigate the

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4. Respondents chide Matson for not having included a conclusionary allegation that it is a "party aggrieved" (RB 14, note 6). It is of course the ultimate facts of Matson's interest, rather than the conclusionary statement, that were correctly alleged in Matson's petition. Associated Industries, Inc. v. Ickes, 134 F.2d 694, 712-13 (2d Cir. 1943), *vacated as moot,* 320 U.S. 707 (1943).

5. In contrast to *Sanders,* the cases relied on by petitioners involve denial of standing in instances where no direct competition existed. *E.g.* United States Cane Sugar Refiners Ass'n. v. McNutt, 138 F.2d 116 (2d Cir. 1943); Simmons v. FCC, 145 F.2d 578, 579 (D.C. Cir. 1944); Simmons v. FCC, 169 F.2d 670, 672 (D.C. Cir. 1948), *cert. denied* 335 U.S. 846 (1949); Mansfield Journal Co. v. FCC, 180 F.2d 28, 36-37 (D.C. Cir. 1950); Pittsburgh Radio Supply v. FCC, 98 F.2d 303 (D.C. Cir. 1938). Most of these cases have been repeatedly distinguished in more recent decisions.

validity of administrative orders of various kinds granting benefits to persons even remotely competitive.[6] Such persons have the right to litigate all issues in the case, having standing not only as representatives of their own interests but also as representatives of the public interest.[7] In more recent years this doctrine has been extended to include persons who have no economic interest.[8] In determining questions of standing, the courts have been particularly cognizant of preserving the litigating rights of those classes of persons that the statute in question was designed to protect.[9] Here, there can be no doubt that competing carriers are one of the classes intended to be protected by Section 15.

It is of interest to note that one of the respondents did some pioneering work in the field of the standing of competing carriers to challenge administrative action. In *American President Lines, Ltd. v. FMB,* 112 F. Supp. 346 (D.D.C. 1953), APL successfully overcame the challenge to its standing in an action to set aside the award of subsidy to two of its competitors, one of whom is now an intended merger partner. The court held the *Sanders* case interpretation of the Federal Communications Act to govern the similar language ("adversely affected or aggrieved") in the Administrative Procedure Act (now enacted as 5 U.S.C. § 702). "If a competitor *who fears adverse economic effects,* has a right to challenge the legality of official action under one of the Acts, the

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6. Transcontinental Bus System v. CAB, 383 F.2d 466, 475-77 (5th Cir. 1967); National Airlines, Inc. v. CAB, 306 F.2d 753, 757-58 (D.C. Cir. 1962); Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958); Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953); National Coal Ass'n v. FPC, 191 F.2d 462 (D.C. Cir. 1950).

7. Federal Communications Comm'n v. National Broadcasting Co., 319 U.S. 239 (1943); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14-15 (1942); Associated Industries, Inc. v. Ickes, 134 F.2d 694 (2d Cir. 1943), *vacated as moot,* 320 U.S. 707 (1943).

8. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615-16 (2d Cir. 1965); State of Washington Dept. of Game, et al. v. FPC, 207 F.2d 391, 395 at n. 11 (9th Cir. 1953), *cert. denied* 347 U.S. 936 (1954).

9. Scenic Hudson Preservation Conference v. FPC, *supra;* Reade v. Ewing, *supra;* Associated Industries, Inc. v. Ickes, *supra;* State of Washington Dept. of Game, et al. v. FPC, *supra.*

conclusion is inescapable that he may do so under the other Act." (112 F. Supp. at 349, emphasis ours.)[10] It is perhaps noteworthy that the court thought it sufficient for APL to *fear* adverse economic effects. We suppose that the increased competitive strength that would flow from the award of subsidy to an existing competitor is comparable in principle at least to the increased competitive strength that would result from merger of three existing subsidized competitors.

2. THE RES JUDICATA EFFECT OF THE BOARD'S ORDER.

There is even a more fundamental reason why Matson is legally aggrieved by the Board's order. The Commission has determined in a proceeding to which Matson was a party that it has jurisdiction to immunize the merger of three of Matson's competitors from the antitrust laws. The only means by which Matson could contest the validity of that determination is by appeal of the Commission's order. Matson would be barred by the *res judicata* (or collateral estoppel) effect of the Board's order from collaterally attacking it in a subsequent antitrust suit. *Sunshine Coal Co. v. Adkins,* 310 U.S. 381, 402-04 (1940); *Seatrain Lines v. Pennsylvania R. Co.,* 207 F.2d 255, 259 (3rd Cir. 1953); 2 Davis *Administrative Law Treatise,* § 18.07 (1958). Hence, Matson's legal rights are adversely affected by the Commission's order, and for that reason alone it has a sufficient interest to appeal the Commission's decision. *Fishgold v. Sullivan Drydock Corp.,* 328 U.S. 275, 281-84 (1946). See also *Associated Industries, Inc. v. Ickes, supra* at 705.[11]

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10. The court's holding that the Administrative Procedure Act conferred a right to judicial review upon the petitioner therein was disapproved in Kansas Power & Light Co. v. McKay, 225 F.2d 924, 932 (D.C. Cir. 1955), *certiorari denied,* 350 U.S. 884 (1955). However, the court's holding that petitioner had *standing* to obtain review was not disturbed. 3 Davis, *Administrative Law Treatise* 256 (1958). Here, of course, there is no question that a statutory right of review is afforded by 28 U.S.C. § 2342.

11. Whether *res judicata* would apply to the United States we do not argue. In this connection, see note 13, *infra.*

B. The Commission Did Not Determine That Matson Lacks an Interest.

The Commission determined the question of Matson's standing in its order of investigation, naming Matson as a party to the proceeding (R.D. 1, p. 2), and it does not now challenge the adequacy of Matson's standing to obtain review of its decision. Matson had previously filed a petition in which it alleged its interest as a potential competitor of the merger applicants. The respondents' reply argued that Matson had not alleged a sufficient interest to provide the basis for a hearing because (1) Matson, which was not then a competitor in the Far East trade, had no firm plans for entering the trade and (2) the effect of the merger on APL's entry into the Hawaii trade would be negligible. Matson filed a response, in which it asserted, among other things, that the genuineness of Matson's plans to enter the Far East trade at the very least presented a question of fact that could be determined after hearing.

The Commission's order contained no reservation regarding Matson's status as a party.[12] Respondents' reliance on *Interstate Electric, Inc. v. FPC,* 164 F.2d 485 (9th Cir. 1947) and *Panhandle Eastern Pipe Line Co. v. FPC,* 219 F.2d 729 (3d Cir. 1955), certiorari denied, 349 U.S. 945 (1955), is therefore misplaced. In both of those cases the order granting intervention specifically reserved the question of intervenors interest, and the Commission's final orders were construed as determining that question adversely to petitioner.

Nor did the Commission's decision purport to hold that Matson did not have a genuine interest in the Far East trade or that it lacked standing as a party to the proceeding. The Commission's

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12. The Commission's Rules (46 C.F.R. § 502.69) require petitions to "state clearly and concisely petitioners grounds or interest in the subject matter." Had the Commission wished to grant Matson provisional status pending determination of its "interest", it would have expressly done so. Indeed, the Examiner subsequently held that a petition to intervene, which would have required the *Examiner* to determine Matson's "interest" (46 C.F.R. § 502.72), need not be filed by Matson, because it was named a party in the Commission's order (R.D. 8).

decision traced the steps that Matson had then taken to enter the Far East trade and the details of its proposed operation. The Commission noted that Matson's Far East plans "were formally announced while the hearing herein was in progress; it has been proceeding with its planning as fast as it could. . . ." (R.D. 43, p. 28.) These findings were sufficient to establish Matson's "interest" if any had been needed.

It is perfectly clear that the language on which respondents rely was directed to a determination of the ultimate issues of approvability, not of standing. The findings respondents quote, when placed in context, show that the Commission found "there can be no doubt that the merged company would gain considerable flexibility and would become in many ways a more formidable competitor as a result of the integration of the fleets," but the Commission believed such results would not be contrary to the public interest, "unless they may drive less efficient competitors out of business" (R.D. 43, p. 15). Under the standards applied by the Commission, which Matson maintains are erroneous (MB 50-61), it concluded that "the record does not establish any probability whatever that the proposed merger will have any injurious, much less crippling, impact" upon Matson's service (R.D. 43, pp. 28-29), "the record does not establish the probability of any destructive or stifling effect upon competition or any competitor" (R.D. 43, p. 42), and "the benefits of the merger will outweigh any potential injury" (R.D. 43, p. 43).

Respondents seem to attach significance to the fact that Matson did not here take exception to the findings quoted above. Matson did not take exception to them, because it regards them as products of the erroneous criteria that were applied by the Commission under Section 15. We have stated at some length in our opening brief what we think the proper test should be and what showing should have been required from the merger applicants (MB 40-50). As we there point out, the Commission did not even require respondents to come forth with a plan of merger or to explain how their combined fleets would be operated. Under the circumstances, it would have been virtually impossible for Matson to

demonstrate precisely in what respects it would be injured by a plan of operation not divulged, and Matson has never claimed, based on the facts as presently known, that it would be driven "out of business" as a result of the merger (R.D. 43, p. 15). We think these are self-evidently matters that far transcend and have no relation to the question of Matson's interest in the litigation.

In the final analysis, respondents betray something less than full confidence in their contention that Matson lacks standing. For they assert that the Court has jurisdiction because Justice, itself a *respondent* in the case, has seen fit to support Matson's side of the jurisdiction argument. This assertion is obviously specious. The case is either properly here because Matson had standing to bring it here, or it is not here at all. If respondents were correct, the proper remedy would be a motion to dismiss.[13] What respondents' contention comes down to is a thinly veiled attempt to discourage this Court from considering the Commission's decision on the "merits" (MB Point II, pp. 40 *et seq.*), in the unlikely event it should hold the Commission has merger jurisdiction.

II. THE COMMISSION LACKS MERGER JURISDICTION.

Matson's position on the jurisdictional question in this case can be summarized as follows: Section 15 lists a series of types of agreements to which it is applicable, but nowhere expressly refers to agreements for the acquisition of the stock or assets or the corporate amalgamation of carriers. Thus, if the Commission has

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13. The intervention of the Department of Justice in the proceeding below made the United States a "party" before the Federal Maritime Commission. (JB 3, fn. 1; Rule 3(a) of the Commission's Rules of Practice; 46 C.F.R. § 502.41.) Respondents do not question the right of the United States to have petitioned this Court. Their complicated analysis at this point seems to be that Justice did not do so because it could not or did not anticipate the "defects" in Matson's petition, and for this reason the Court should save Justice from its omission and rule the case properly here for review. (RB 18.) For the reasons discussed above, Matson has adequate standing and the Court has no occasion to fabricate what would otherwise be a non-existent jurisdiction. The simple inference would seem to be that Justice, with full knowledge of the case and the Commission's decision, properly concluded that Matson had standing to bring all or any of the issues in the case here for review.

jurisdiction respecting merger *agreements,* it must be by implication included in the phrase "agreements . . . destroying competition." We have advanced several reasons for concluding that such an attenuated merger jurisdiction should not be implied (MB 12-40).

The position taken by Justice in its brief on the jurisdictional issue is essentially the same, with only minor variations, as that advanced by Matson.

The briefs filed, respectively, by the Commission and respondents argue that merger agreements fall within the literal language of Section 15 and that a strong showing must be made for excluding them. They then undertake to controvert the reasons raised by Matson and Justice for concluding that Section 15 was not intended to extend to mergers. Except for the somewhat novel "loophole" argument advanced by the Commission (*infra,* p. 17), neither respondents nor the Commission have advanced any affirmative arguments in favor of the attenuated merger jurisdiction claimed by the Commission. In our judgment, they have equally failed to neutralize the several compelling reasons advanced by Matson and Justice for concluding that Commission jurisdiction over mergers by agreement should not be implied. We shall now comment briefly upon the principal contentions raised by the Commission and respondents.

A. The Language of Section 15.

Both the Commission and respondents concede that the language of Section 15 does not expressly refer to mergers or contain the kind of language that customarily is employed by Congress in investing regulatory powers over corporate amalagamations.[14] (CB 6; RB 20.) However, they assert that a merger

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14. Section 7 of the Clayton Act, as originally enacted, employed the terms "acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation" (38 Stat. 731 (1914)).

Section 11 of The Panama Canal Act of 1912 prohibited any common carrier subject to the Act "to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly,

agreement fits within the literal language of Section 15 because it destroys competition, and respondents chide Matson and Justice for allegedly pushing "in silence past this central point to advance a variety of peripheral theories." (RB 19.) We thought the statement in our opening brief that "Section 15 does not extend to mergers either expressly or impliedly" (MB 12) was reasonably clear. Whether and to what extent mergers were intended by Congress to be subject to Section 15 is the whole point here at issue. Not even the Commission claims that all mergers or even all merger agreements are subject to Section 15.

Respondents characterize Section 15 as having a "broad sweep" and quote from the Supreme Court's decision in *Volkswagenwerk v. FMC,* 390 U. S. 261, 273 (1968), to the effect that Section 15 "uses expansive language" (RB 22). Respondents choose to ignore the facts, noted in Matson's brief, that Section 15 describes a series of specific types of agreements (MB 12-13) and that it is the final phrase, "*or in any manner* providing for an exclusive, preferential, or cooperative working arrangement" (emphasis ours) that the Supreme Court referred to in *Volkswagenwerk* when it chided the Commission for taking an "extremely narrow" view of an agreement that it held to be a cooperative working arrangement (MB 29, note 30).

In denying that the final phrase of the first paragraph of Section 15 characterizes the preceding phrases (RB 22), respondents

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indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete. . . ." (37 Stat. 566-67 (1912)).

The Transportation Act of 1920 vested the Interstate Commerce Commission with jurisdiction to regulate the "acquisition . . . by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system" and to permit "two or more carriers by railroad . . . to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation. . . ." (41 Stat. 481-82 (1920)).

ignore the parallel between Section 15 and Section 412 of the Federal Aviation Act (MB 31, note 33), and erroneously suggest that other types of agreements that are not working arrangements "have always been subject to Section 15" (RB 22). Their examples of a sale of a line or of a ship to a competitor and of an agreement not to compete between two existing steamship companies are clearly inapposite. The Commission has never held that an agreement to sell a ship or line is subject to Section 15, unless a covenant not to compete among continuing entities was also involved.[15] Indeed, respondents concede as much at a later point in their brief when they discuss three pertinent authorities that specifically so held (RB 40). The same cases stand for the proposition that a covenant not to compete among continuing entities is a working arrangement, which, contrary to respondents' assertions (RB 22), it clearly is.

Matson contends that the Commission is to approve only agreements over which it can maintain continuing supervision and that a merger agreement is not such an agreement (MB 13-14). The Commission responds that supervision will be maintained in the form of rate regulation of the continuing entity (CB 13). In support of this, the Commission erroneously quotes (CB 13, fn. 5) the final paragraph of Section 18(a) of the Shipping Act, which relates to interstate commerce. The merged company's operations will be, of course, predominantly in foreign commerce. Regulation of respondents' rates in foreign commerce, to the extent that it effectively exists (*e.g.,* Sections 17 and 18(b)(5) of the Shipping Act; MB 56, note 59), might provide minimal protection to the shipping public, but it would hardly be continuing

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15. For example, when Matson entered into an agreement for the acquisition of the stock of the Los Angeles Steamship Company, it was advised by the United States Shipping Board that "the subject matter of said agreement is not within the purview of Section 15 of the Shipping Act, 1916" (R.Ex. 169). Similarly, when Matson acquired all of the assets of Oceanic Steamship Company, the Board advised Matson that the agreement was not subject to Section 15 (R.Exs. 165, 167, 168).

supervision of the merger agreement and would afford scant comfort to respondents' competitors.

B. The Purpose of Section 15.

In our opening brief (MB 14-24) we emphasize that the regulatory scheme adopted by Section 15 was intended to regulate working arrangements between carriers serving the foreign commerce of the United States, foreign-owned as well as United States-owned, to discourage a tendency toward merger or destructive competition. Congress determined that it would not be practicable to undertake the direct regulation of the ownership, control and amalgamation of such companies, inasmuch as most of the companies serving the United States foreign commerce were foreign-owned.

Respondents refer at some length to the portion of the Alexander Report that dealt with water carriers engaged in domestic commerce, all of whom would be necessarily owned by citizens of this country, and correctly point out that consideration was given to the patterns of ownership among these carriers (RB 30-32). As we previously emphasized (MB 18), this portion of the Alexander Report was contained in a completely different section from the portions which gave rise to Section 15, and the Committee concluded that the Panama Canal Act of 1912, which specifically dealt with the problem of ownership of water carriers by railroads, would "go far toward eliminating some of the undesirable practices." No recommendations were therefore made for the regulation under the Shipping Act of mergers among companies engaged in domestic commerce. Having discussed the problems of stock ownership and control of such carriers in express terms, the Committee surely would not have concealed its recommendations regarding such matters in an obscure paragraph that contained no express reference to them, as respondents suggest (RB 31). Inasmuch as Congress had repeatedly determined that the most prevalent means of effecting monopoly power through corporate control was by stock ownership, it would have been

inexplicable for Congress to omit merger by stock ownership but include merger by agreement.[16]

Respondents and the Commission have misconstrued the significance we attach to the problems inherent in granting merger jurisdiction over foreign-owned companies. We do not contend that the Commission's failure to "assume jurisdiction over the 1964 Japanese mergers" is a "recognition that § 15 does not reach to domestic mergers" (RB 25). Rather, we contend that Congress wished to adopt a form of regulation for the international shipping industry that would be applicable alike to foreign-owned and United States-owned companies. Control of foreign mergers was excluded within the limits and for the very reasons suggested in respondents' brief (pp. 26-27). Hence, control of domestic mergers was also excluded in the interests of uniform regulation. Of course, the danger is not that Commission regulation of mergers by United States-owned companies would "impose an undue burden on domestic carriers" (CB 15). Rather, it is that the Commission would be compelled to adopt a permissive attitude toward mergers of United States-owned companies in order to *avoid* imposing an undue burden on such companies. This attitude would in turn encourage a tendency among foreign-owned companies to merge. Thus, the Commission would be placed in the untenable position of encouraging the merger of steamship companies, which is the antithesis of the policy of the Shipping Act. Only by exercising no merger jurisdiction could the Commission properly serve the purposes of the Shipping Act.[17]

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16. The same Congress that investigated the shipping industry and produced the Alexander Report had also enacted the Clayton Act. Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966). Congress had determined that Section 7 of the Clayton Act could adequately deal with domestic mergers by prohibiting consolidation of corporate control through stock acquisition, because that was the form of merger then most prevalent. United States v. Philadelphia National Bank, 374 U.S. 321, 338 (1963).

17. It would then be for the Justice Department to wrestle with the problem of enforcing Section 7 of the Clayton Act within industries, such as the steamship industry, in which competition from foreign-owned companies may be a significant factor. For whatever it is worth, we do not

C. Section 7 of the Clayton Act and Advices to Congress.

The 1950 Amendment to Section 7 of the Clayton Act provides that Section 7 shall not apply to transactions authorized by the Commission, among other agencies, "under any statutory provision vesting such power", and our opening brief cites two Supreme Court cases holding that this provision was not a recognition by Congress that any particular agency there listed in fact had the power to approve mergers with the effect of immunizing them from Section 7 (MB 22-23). Respondents characterize Matson's position as "surprising" (RB 38). The Commission's brief asserts that Section 15 agreements "could not be subject to Section 7 unless they were merger agreements" and that Congress "was aware that the Commission claimed such jurisdiction under Section 15" (RB 11).

Inasmuch as Section 7 of the Clayton Act applies to acquisitions of "the whole or any part" of the stock or assets of a corporation, it does not seem fair to say that Section 7 is limited to "merger agreements". It is not difficult to imagine various kinds of working arrangements among carriers that would be clearly subject to Section 15 and also within the purview of Section 7. These could include such arrangements as the acquisition of "good will" by one carrier from another for a term of years with a covenant not to compete attached, which was held to be subject to Section 15 in *New York and Porto Rico Steamship Co.—Waterman Steamship Corp. agreement,* 2 U.S.M.C. 453 (1940), or the formation and operation of a joint venture corporation by two entities subject to Section 15 with agreements to seek new business for the new enterprise rather than for themselves, which was held subject to Section 15 in *Associated Banning Co. v. Matson Navigation Co.,* 5 F.M.B. 336, 342 (1957). Hence, there is nothing "surprising" about the propositions that

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share respondents' confidence that the courts "never will apply the Clayton Act to mergers of foreign firms doing business with the United States" (RB 25). *Cf.* United States v. Aluminum Co. of America, 148 F.2d 416, 439-45 (2d Cir. 1945).

Congress did not intend to determine in 1950 the extent to which any agency listed in Section 7 had jurisdiction conflicting with that created by Section 7 or that all such agencies were included by Congress "in the interests of accommodation" (MB 23).[18]

D. Repeal of the Antitrust Laws by Implication.

Respondents concede the rule that the antitrust laws are not to be repealed nor their exemptions expanded by implication is "a settled one" (RB 27). However, they then assert that to imply merger jurisdiction for the Commission would not be an implied repeal of the antitrust laws, because Section 15 contains an express antitrust exemption. This strikes us as distinction without a difference. Whether the implication involved is in fitting mergers under a statute containing an exemption or in finding an antitrust exemption inherent in a statutory scheme is immaterial. In either case, repeal of the antitrust laws by implication is equally involved. Indeed, *Milk Producers Ass'n v. United States,* 362 U. S. 458, 469-70 (1960) involved an express exemption from Section 7 of the Clayton Act for transactions authorized by the Secretary of Agriculture and a refusal on the part of the Court to imply a merger jurisdiction in the Secretary.

Respondents push credibility to the breaking point when they assert that the Court in the *Carnation* case[19] recognized that the Commission has merger jurisdiction (RB 29-30). *Carnation,* of course, had nothing to do with mergers. We doubt that the Supreme Court felt obliged to analyze each of the sections of the

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18. Of course, it was generally thought in 1950, partly as a result of United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1932), that the regulated steamship industry was broadly exempted from the antitrust laws. Indeed, the Commission chairman's "advice" to Congress in 1956 (RB 39) specifically relied on *Cunard*. The Supreme Court's later decision in Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958) prompted a decided retreat from that position, as Chairman Stakem's 1962 testimony before the Celler Committee makes abundantly clear (MB 25-26).

19. Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966).

Clayton Act to determine precisely which ones might fit under Section 15 before observing that Section 15 contains an express exemption from the Sherman and Clayton Acts.[20] Respondents' reliance (RB 29) on a footnote in *United States v. Philadelphia National Bank,* 374 U.S. 321, 350, note 27 (1963), is in a similar vein. Quite obviously, when the Court referred to the express exemptions in the Shipping Act, it was referring to the general exemption provision without regard to whether the exemptions covered mergers. Respondents fail to mention that the footnote referred to includes in its listing of other statutes Section 5b (9) of the Interstate Commerce Act (49 U. S. C. § 5b (9)) and the Webb-Pomerene Act (15 U.S.C. § 62), both of which, like Section 15 of the Shipping Act, grant antitrust immunity within defined limits, but neither of which includes *merger* immunity.

E. Other Agencies.

In our opening brief, we emphasized that every other agency that has power to approve mergers and exempt them from the antitrust laws has been *expressly* granted that power by Congress with standards made specifically applicable to mergers and authority to order divestiture (MB 30-37). We are not aware of a single case in which a court has found an implied authority in an administrative agency to approve mergers, and apparently the researches of respondents and the Commission have not uncovered any such cases either. The Commission's brief ignores this phase of the argument, but respondents pose a series of rationalizations for the differences in statutory schemes. Only two merit comment.

(1) The suggestion (RB 42-43) that other agencies with express merger jurisdiction also have promotional functions is a point we might have made. As respondents point out, the Mari-

20. We have previously suggested the sale of vessels with a covenant not to compete attached as an example of a non-merger transaction that would be subject to both Section 7 of the Clayton Act and Section 15 (p. 11). Moreover, Section 7 as initially enacted, which covered only stock acquisitions, and the exercise of Commission jurisdiction over "agreements" to merge would be mutually exclusive.

time Administration is given express merger authority by Section 608 of the Merchant Marine Act, 1936 (46 U.S.C. §1178). Prior to Reorganization Plan No. 7 of 1961 (75 Stat. 841), responsibilities under Section 15 and Section 608 were vested in a single agency. Hence, by analogy to the other statutes, the Maritime Administration has merger authority but the Commission does not.

(2) Respondents suggest that the CAB exercises merger jurisdiction under both Sections 408 and 412 of the Federal Aviation Act (49 U.S.C. §§ 1378, 1382). The important distinction is that agreements contemplating merger, but not mergers, are subject to Section 412, while mergers are subject to Section 408. The bone of contention here is that the Commission has purported to approve the merger itself pursuant to Section 15.[21] By analogy to Section 412, the Commission has no such authority.

F. Orderly Regulation.

Our opening brief points out the confusing regulatory patchwork that results from the Commission's view of its merger jurisdiction (MB 37-40). The Commission's brief in turn suggests that the absence of merger jurisdiction in the Commission would create a "major loophole". Thus, "rather than enter into a cost sharing or profit sharing agreement which the Commission would disapprove the parties could simply merge". (CB 14.) This strikes us as farfetched. Moreover, even under the Commission's view of its jurisdiction, the parties are free to merge without Commission approval by stock acquisition.

The more important regulatory problem it seems to us is presented by a potential conflict in jurisdiction between Justice and the Commission. By creeping stock acquisition, initially subject to Section 7 of the Clayton Act, one carrier can gain control of another and then invoke the cloak of Commission jurisdiction over the entire transaction by entering into a merger agreement. This is essentially what has happened here (MB 37-38). Nor do we

21. Matson contended before the Commission that the instant agreement should be submitted to the Commission, but that Commission approval could not extend to the merger itself.

criticize the Commission "for not condemning the stock acquisitions of APL and Natomas in 1954 and 1956" (RB 25). It obviously had no power to do so. What we do criticize is the present exercise of jurisdiction and the Commission's regarding the earlier transactions as a factor favoring approval of the merger (MB 40).

III. THE COMMISSION'S APPROVAL OF THE MERGER IS NOT SUPPORTED BY THE RECORD.

A. The Erroneous Standards Applied.

The Commission has with one hand reached for jurisdiction over merger agreements on the theory that they are agreements "destroying competition". With the other hand it has granted absolution to the merger on the theory that mergers are not sufficiently anticompetitive to require application of the Commission's "antitrust test" recently approved by the Supreme Court in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 243-46 (1968) (the *Travel Agents* case). Self-evidently, if the Commission correctly invoked jurisdiction, it erred in failing to apply its antitrust test.

Under the rule of the *Travel Agents* case, any agreement that interferes with the policy of the antitrust laws will be approved by the Commission only if it finds that the agreement is "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose" (390 U.S. at 243). The Commission admittedly did not apply that test here and did not make the findings that would be required if it had. In rejecting the test, the Commission relied on the Court of Appeals' decision in the *Travel Agents* case, which was subsequently reversed by the Supreme Court, and the assertion that the antitrust test would be applied only in the case of *per se* antitrust violations (R.D. 43, p. 30).

The Commission's brief does not even cite the *Travel Agents* case, and quite obviously regards its rule inapplicable to mergers (CB 16). Respondents are driven to a similar position, though they characterize the *Travel Agents* case as applying in the case

of a "*prima facie*" antitrust violation (RB 49).[22] They say that the Commission's test is consistent with the *Travel Agents* case, presumably on the assumption the Commission found the merger was not even *prima facie* contrary to the antitrust laws. Such a contention merits no serious attention since the Commission found that this merger would produce a "high degree of concentration" in one of the markets considered (R.D. 43, p. 35).[23] Cf. *United States v. Philadelphia Nat. Bank, supra* at 364.

Respondents also contend that they "came forward with a prodigious amount of evidence of maritime transportation gains from this merger" (RB 49) and that the "Commission gave thoughtful attention to the transportation benefits resulting from the merger" (RB 56). Respondents correctly refrain from contending, however, that the Commission found the merger justified by a serious transportation need or important public benefits. Of course, the Commission made no such findings. There is no serious disagreement about what the Commission did find.[24] It found essentially that respondents' stockholders would benefit financially and that the merged company would be a more formidable competitor than each of the three lines operating separately. (MB 61-68; RB 56-57.) These findings were clearly insufficient under the doctrine of the *Travel Agents* case.

B. Respondents' Failure of Proof.

In addition to the Commission's failure to apply its antitrust test, it erroneously failed to require production of the kind of

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22. The words used by the Court were "restraints which interfere with the policies of the antitrust laws" (390 U.S. at 243).

23. If the Commission were in fact to conclude that the merger would not interfere with the policies of the antitrust laws, it would at least need to make such a finding. But it expressly declined to do so: "[W]hether the 'relevant market,' for antitrust purposes, should be the liner market only, or liners plus nonliners, market share is by no means controlling as to the public interest. . . . It is by no means certain that the proposed transaction . . . would violate the antitrust laws; but . . . the Commission need not determine whether it would or not. . . ." (R.D. 43, pp. 35, 43.)

24. If respondents intended to suggest Maritime Administration policy was considered by the Commission (RB 59-60), they are mistaken. The Commission expressly disavowed such considerations (R.D. 43, p. 2).

information required from respondents to afford a balanced appraisal of the merger in the public interest (MB 68-73). Respondents reply that (1) "Matson bears its own responsibility for any deficiency it finds in the record" (RB 51) and (2) the details of the merger should be of no concern to the Commission (RB 61). There is a short answer to each of these contentions.

(1) It is within the sole power of the merger applicants to come forth with sufficient details to inform the commission of their plans, and they had the obligation to do so. *Anglo-Canadian Shipping Co., Ltd. v. United States,* 264 F.2d 405, 416 (9th Cir. 1959).

(2) Every other agency that regulates mergers requires details of the merger plan of the kind here withheld. As one example of the relevance here, the proposed mode of operation of the fleets of the merged companies subsequent to the merger is of crucial importance in assessing the competitive consequences of the merger. These are matters that respondents could have worked out with the Maritime Administration in sufficient detail to present its plans to the Commission. Their failure to do so is inexplicable.

CONCLUSION

For the reasons stated here and in our opening brief, the Commission's order should be reversed. If the Court holds the Commission had jurisdiction, the order should be reversed and the case remanded to the Commission for further proceedings.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules; and I further certify that I have examined the provisions of Rule 39 of said rules.

JOHN E. SPARKS

(Appendix follows)

Appendix

Exhibits Designated by Petitioner and References as to Their Admission into Evidence

Exhibit No.	Identified	Offered	Received
2	R.Tr. 22	R.Tr. 22	R.Tr. 23
12	R.Tr. 105	R.Tr. 214	R.Tr. 222
14	R.Tr. 141	R.Tr. 141	R.Tr. 141
16	R.Tr. 155	R.Tr. 155	R.Tr. 155
18	R.Tr. 162	R.Tr. 162	R.Tr. 162
20	R.Tr. 166	R.Tr. 167	R.Tr. 167
21	R.Tr. 186	R.Tr. 188	R.Tr. 933
28	R.Tr. 331	R.Tr. 334	R.Tr. 335
32	R.Tr. 456	R.Tr. 457	R.Tr. 457
37	R.Tr. 560	R.Tr. 581	R.Tr. 581
40	R.Tr. 592	R.Tr. 594	R.Tr. 601
41	R.Tr. 601	R.Tr. 602	R.Tr. 603
43A	R.Tr. 607	R.Tr. 607	R.Tr. 609
43C	R.Tr. 607	R.Tr. 607	R.Tr. 609
49	R.Tr. 666	R.Tr. 667	R.Tr. 667
62	R.Tr. 934	R.Tr. 940	R.Tr. 940
65	R.Tr. 995	R.Tr. 997	R.Tr. 999
80	R.Tr. 1095-96	R.Tr. 1096	R.Tr. 1097
91	R.Tr. 1248	R.Tr. 1248	R.Tr. 1248
104A	R.Tr. 1255	R.Tr. 1255	R.Tr. 1255
104B	R.Tr. 1255	R.Tr. 1255	R.Tr. 1255
104C	R.Tr. 1255	R.Tr. 1255	R.Tr. 1255
115	R.Tr. 1262	R.Tr. 1327	R.Tr. 1327
139	R.Tr. 1656	R.Tr. 1656	R.Tr. 1656
142	R.Tr. 1674	R.Tr. 1680	R.Tr. 1680
143	R.Tr. 1675	R.Tr. 1678	R.Tr. 1678
151	R.Tr. 1686	R.Tr. 1687	R.Tr. 1687
152	R.Tr. 1698	R.Tr. 1699	R.Tr. 1700
165	R.Tr. 1915	———	———
167	R.Tr. 1915	———	———
168	R.Tr. 1915	———	———
169	R.Tr. 1915	———	———
176	R.Tr. 2000	R.Tr. 2002	R.Tr. 2002